Wangsa Timber Industries Sdn Bhd v Adulfast Anthony Robert Ignatia Lee

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO S–02–842 OF 1995
NH CHAN, ABU MANSOR AND MOKHTAR SIDIN JJCA
19 SEPTEMBER 2001

Civil Procedure *— Costs — Interim injunction — Application to extend injunction pending outcome of issue of main suit granted — Whether application for extension a necessity — Whether judge in awarding order for costs had exercised his discretion mechanically and judiciously — Whether judge was justified in awarding costs against defendants in appeal — Whether appropriate costs should be costs to follow event*

The plaintiffs' ex parte summons in chambers praying for an interim injunction against the defendants to stop them from damaging, demolishing and obstructing the driveway was granted by the judge. The plaintiffs then filed an inter partes summons in chambers and prayed, inter alia, for an extension to the order for interim injunction. The defendants resisted the application. The judge allowed the plaintiff's application and awarded cost against the defendants. The present appeal was only in respect of the order for costs. It was submitted that the judge exercised his discretion mechanically and not judiciously. It was also submitted that the issue upon which the costs were awarded arose from an interlocutory application and as such the appropriate order to be given was costs to follow event.

Held, dismissing the appeal:

It was a matter of necessity that the plaintiffs applied for the injunction pending the outcome of the issue of the main suit. In order to justify the injunction, the plaintiffs had to show that they have a right to the driveway. For that reason the judge in exercising his discretion awarded costs to the plaintiffs in respect of the application. The court found that the judge had not erred in exercising his discretion in awarding costs against the defendants in respect of this application. In fact the court found ample evidence to justify his discretion in awarding costs against the defendants (see pp 436H–437B).

[Bahasa Malaysia summary

Saman dalam kamar ex parte plaintif-plantif yang memohon injunksi interim terhadap defendan-defendan untuk menahan mereka daripada merosak, meruntuh, dan menyekat jalan persendirian telah dibenarkan oleh hakim. Plaintif-plaintif kemudiannya memfail satu saman dalam kamar inter partes dan memohon, antara lain, perlanjutan perintah untuk injunksi interim tersebut. Defendan-defendan membantah permohonan tersebut. Hakim membenarkan permohonan plaintif-plaintif dan memberikan kos terhadap defendan-defendan. Rayuan ini hanya berhubung dengan perintah

untuk kos. Ia dihujahkan bahawa hakim telah melaksanakan budi bicara beliau secara mekanikal dan tidak berdasarkan prinsip kehakiman. Adalah juga dihujahkan bahawa isu yang mana kos diberikan berbangkit daripada satu permohonan interlokutori dan dengan demikian, perintah yang wajar diberikan adalah kos mengikut keadaan (costs to follow the event).

Diputuskan, menolak rayuan tersebut:

Adalah satu keperluan bagi plaintif-plaintif memohon injunksi sementara menunggu keputusan atas isu guaman utama. Untuk menjustifikasikan injunksi, plaintif-plaintif harus menunjukkan bahawa mereka berhak menggunakan jalan persendirian tersebut. Untuk sebab itu hakim dalam melaksanakan budi bicara beliau telah memberikan kos kepada plaintif-plaintif berkaitan dengan permohonan tersebut. Mahkamah mendapati bahawa hakim tidak terkhilaf dalam melaksanakan budi bicaranya dalam memberikan kos terhadap defendan-defendan berhubung dengan permohonan ini. Sebenarnya, mahkamah mendapati keterangan lebih daripada mencukupi untuk menjustifikasikan budi bicara beliau dalam memberi kos terhadap defendan-defendan (lihat ms 436H–437B).]

Notes

For cases on costs generally, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1541–1900.

Legislation referred to

Rules of the High Court 1980 O 29 r 1(2)

Appeal from: Suit No K22–178 of 1994 (High Court, Kota Kinabalu)

Marina Tiu (*Yap Chin & Tiu*) for the appellants.
Clement Skinner (*Skinner Lind Willie Wong & Chin*) for the respondents.

Mokhtar Sidin JCA (delivering judgment of the court):**.** The appellants in the present appeal were the defendants in the court below while the respondents were the plaintiffs. We will refer to the parties as they were in the court below.

The plaintiffs, by way of an ex parte summons in chambers dated 17 November 1994 prayed for the following orders:

(i) the defendant, whether by themselves, their servants, agents or otherwise howsoever be restrained for doing any acts or deeds that would impede or deny the plaintiffs access to the dominant tenement held under CL 015276418 through the servient tenement held under CL 01526409 by using the existing driveway or any part thereof or doing any act to damage or demolish the existing driveway on the servient tenement;

(ii) That the plaintiffs undertake to abide by any order the court or judge may make as to damages in case the court or judge should hereafter be of the opinion that the defendant shall have sustained any damage by reason of the orders sought herein which the plaintiffs ought to pay; and

(iii) that the cost of this application be paid by the defendant.

The learned judge granted the interim injunction on 17 November 1994. On 25 November 1994, the plaintiffs filed an inter partes summons in chambers and prayed for the following reliefs:

(i) an extension to the order for interim injunction dated 17 November 1994 obtained by ex parte summons in chambers application dated 17 November 1994;

(ii) a mandatory order that the defendant whether by themselves, their servants, agents or otherwise howsoever do restore that portion of the driveway which has been demolished on the servient tenement to allow vehicular access to the plaintiffs' house in the dominant tenement;

(iii) the plaintiffs undertake to abide by any order the court or judge may make as to damages in case the court or judge should hereafter be of the opinion that the defendant shall have sustained any damage by reason of the orders sought herein which the plaintiffs ought to pay; and

(iv) that the cost of this application be paid by the defendant.

The plaintiffs filed an affidavit in support giving full facts and circumstances leading to this application. The defendants resisted the application by filing an affidavit in reply dated 9 January 1995 opposing the inter partes summons in chambers of the plaintiffs and prayed the application be dismissed with costs.

The learned judge allowed the plaintiffs' application and awarded cost against the defendants. Being dissatisfied with that decision the defendants appealed to this court. From the record, the present appeal is only in respect of the order for cost. Paragraph 1 of the memorandum of appeal states:

> The judicial commissioner erred in law when he granted the costs of the respondents' application for interlocutory injunction to the respondents in any event in that:
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> (i) he exercised his discretion mechanically and not judicially;
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> (ii) the learned judicial commissioner did not direct his mind that the order granted on 6 March 1995 being only interlocutory does not finally determine the issue between the respondents and the appellants; and/or
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> (iii) the learned judicial commissioner failed to consider that unless there are cogent reasons that some other order should be made the order as to costs in interlocutory matters should have been costs to follow the event. It is clear from the judgment, no reason was given by the learned judge for awarding cost against the defendants. This is understandable because the principle issue in the application was the injunction to which the learned

judge had given a lengthy judgment showing that the parties took a lot of preparation to argue on the injunction.

It is unfortunate that the notes of evidence in respect of this application are not available in the record of appeal. We are not sure how the issue of costs was argued in the court below, but from the judgment of the learned judge, we are of the view that nothing much, if not none, was said by the parties in respect of costs.

With that scenario, we now deal with the present appeal. Before us, the learned counsel for the defendants conceded that cost is a matter of discretion for the judge, but then she said that though it is a matter of discretion, the learned judge erred in exercising that discretion because he did it mechanically and not judicially. Firstly, we are not sure what is meant by mechanically. No instances was cited to us how a mechanical discretion operates. The defendants also failed to show us how the learned judge in exercising his discretion did it mechanically. No authority was cited to us.

It was contended before us by the learned counsel for the defendants that the issue upon which the present cost was awarded arose from an interlocutory application and as such the appropriate order to be given is cost to follow event. Her reason for the contention is that the interlocutory order ensues does not finally determine the issue between the parties.

There is no doubt that the issue of cost which is the subject matter of this appeal, arose from an interlocutory application for injunction to stop the defendants from damaging, demolishing and obstructing the driveway to the plaintiffs' house and land. The main issue is the claim by the plaintiffs for easement of right of way in respect of the driveway. When the present application came up for hearing before us the appeal in respect of the main issue had been decided by us whereby we confirmed the decision of the learned judge in that the plaintiffs had acquired easement of right of way in respect of the driveway.

In the present appeal, the plaintiffs took up an application under O 29 r 1(2) of the Rules of the High Court 1980 ('the RHC'), seeking interlocutory injunction to stop the defendants from damaging, demolishing and obstructing the driveway. Due to the urgency to stop the defendants' act of damaging, demolishing and obstructing, the application was made by way of ex parte. The court awarded the injunction which under O 29 r 1(2B) of the RHC has a life span of only two weeks. Before the expiry of the two weeks, the plaintiffs by an inter partes application applied to the court to have the injunction extended indefinitely until the main issue of easement is resolved. It is plain to us that the defendants resisted the application to extend the injunction indefinitely. Judging from the judgment of the learned judge, the plaintiffs had no choice but to resort to the court to stop the defendants from damaging, demolishing and obstructing the driveway. It is clear to us that it is a matter of necessity that the plaintiffs applied for the injunction pending the outcome of the issue of the main suit. We have heard the appeal in respect of the main suit and we are familiar with the issue which is the claim for easement of right of way in respect of the driveway. The injunction applied for by the plaintiffs was to

A stop the defendants from damaging, demolishing and obstructing the driveway. In order to justify the injunction, the plaintiffs have to show that they have a right to the driveway. For that reason, the learned judge in exercising his discretion awarded cost to the plaintiffs in respect of this application.

B We are of the view that the learned judge had not erred in exercising his discretion in awarding cost against the defendants in respect of this application. In fact, we find there are ample evidence to justify his discretion in awarding costs against the defendants.

In view of the above, the appeal is hereby dismissed. The decision of the learned judge in awarding cost against the defendants in respect of this C application is affirmed. The learned counsel for the plaintiffs is not pressing for cost in the appeal before us. We make no order as to cost in this court. The deposit in respect of this appeal is hereby ordered to be refunded to the appellants.

My learned brother, Abu Mansor JCA, who has the opportunity of D reading this judgment in draft, has expressed his concurrence with this judgment.

Appeal dismissed.

Reported by Jafisah Jaafar

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